TITLE 327 WATER POLLUTION CONTROL BOARD

LSA Document #08-764

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING

The Water Pollution Control Board held a public hearing on July 27, 2011, on the draft rule, LSA Document #08-764, regarding development of new rules and amendments to rules concerning antidegradation standards and implementation procedures. The following commenters spoke at the hearing:

Andes, Fredric P., Attorney with Barnes & Thornburg LLP (FA)
Bennett, Patrick, Indiana Manufacturers Association (IMA)
Ettinger, Albert, attorney in private practice (AE)
Griffin, Vince, Indiana Chamber (VG)
Humes, John, Hoosier Energy Rural Electric Cooperative and Indiana Utility Group (IUG)
Hyman, Jeffrey, Attorney representing the, Conservation Law Center (JH)
Maloney, Tim, Hoosier Environmental Council (TM)
Miller, Joe, Rose Acre Farms (JM)
Miller, Richard, Conservation Chair of the Hoosier Chapter of the Sierra Club (RM)
Nelson, Kay, Northwest Indiana Forum (NIF)
Quinn, Bowden, representing the Sierra Club Hoosier Chapter with endorsement by Nicole Kamins Barker, Save the Dunes Council (BQ)
Schneider, Justin, Indiana Farm Bureau (IFB)
Trenary, Josh, Indiana Pork Advocacy Coalition (IPA)
Wagner, William C., Attorney representing the Indiana Water Quality Coalition and Indiana Manufacturers Association (WCW)
Wajda, Rick, Indiana Builders Association (IBA)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: The law requires IDEM's rules to minimize expense to regulated entities, achieve the regulatory goal in the least restrictive manner, be comprehendible, easily enforceable, and provide regulatory certainty and be technically feasible. The draft antidegradation rule violates these principles in five ways, including:

(1) basing antidegradation on narrative criteria as opposed to numeric values;
(2) having a definition of "regulated pollutant" because it is so broad as to provide no regulatory certainty;
(3) tying the benchmark available loading criteria to today's loads and volumes without providing a mechanism for petitioning IDEM to reset the benchmark available loading capacity;
(4) failing to provide clarity on what information IDEM will require to justify an exemption, de minimis, and the coverage of a discharge under a general permit; and
(5) requiring a public meeting before the discharger submits an application.

Without significant changes, the antidegradation draft rule is legally vulnerable and not a logical outgrowth of the comments. (WCW)

Response: IDEM worked with key stakeholders throughout the rule development process to draft language that meets both federal requirements and state statute. IDEM believes the proposed rule establishes an appropriate balance to accomplish antidegradation implementation in Indiana. Following are responses to the specific points raised.

(1) IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant because there are pollutants that do not currently have a numeric water quality standard that do merit regulatory review. IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, in practice, for NPDES permits, the narrative criteria of Indiana's water quality standards are protected through the establishment of numeric effluent limitations. These numeric effluent limitations are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation lagoon.
(2) IDEM believes that the definition of a 'regulated pollutant' is specific enough to provide regulatory certainty. The process for determining the pollutants in a proposed discharge which will be limited in an NPDES permit is not anticipated to change.
(3) The purpose of the benchmark available loading capacity is to account for multiple de minimis increased loadings of a pollutant parameter at one location over an extended period of time. After an increased loading, the benchmark loading capacity is compared against the available loading capacity to determine if the stream's available loading capacity has been reduced below the benchmark loading capacity. Proposed discharges that will reduce the available loading capacity below the benchmark may still be approved to proceed if a sufficient antidegradation demonstration is submitted to, and approved by the agency.
(4) IDEM is committed to a workable antidegradation rule and will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.
(5) The proposed rule no longer requires a public meeting be held prior to the submittal of the antidegradation demonstration. However, IDEM encourages those proposing a new or increased discharge to solicit public input about their proposal prior to submitting the antidegradation demonstration.

Comment: How do you determine if there is a de minimis discharge for narrative criteria? IDEM has stated in second notice response to comments that there might be a technology-based effluent limit or a de minimis determined if the pollutant is known to cause or contribute to a violation of narrative criteria. This seems to be impossible. It is not technically feasible to look at a discharge and determine whether or not it will trigger de minimis, which is less than or equal to ten percent of the available loading capacity for unsightliness. (WCW)

Response: IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, for NPDES permits, many of the narrative criteria of Indiana's water quality standards may be protected through the establishment of numeric effluent limitations. These numeric effluent limitations are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation lagoon.

Comment: IC 13-18-3-2(l)(1) states, "The antidegradation implementation procedures must include a definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load." This means that the draft rule must require de minimis to include a quantitative as opposed to qualitative value; therefore, having narrative criteria violates the statute. (WCW)

Response: The proposed rule does include a definition of significant lowering that includes a de minimis quantity of additional pollutant load. Narrative criteria are a component of water quality standards as specified under 40 CFR Part 131. De minimis lowering will be determined for narrative criteria that can be translated into a numeric water quality value.

Comment: Commissioner Easterly speaking to the Environmental Quality Service Council in September 2010 said there are approximately 245,000 compounds that are tracked or regulated by the government; yet, an engineer working for a business cannot go to a table to determine what pollutants are regulated under this antidegradation rule. (WCW)

Response: It is the obligation of anyone proposing to discharge to a water of the state to understand the nature of their proposed discharge and to disclose all pollutants that they propose to discharge in their NPDES permit application. IDEM regulates point sources of discharges through the NPDES program. The pollutant parameters that are regulated under this proposed rule with respect to the NPDES permit program are limited to those parameters that can be included in a NPDES permit based on the source and nature of the discharge and federal effluent limitation guidelines.

Comment: Requiring the applicant to hold a public meeting before submitting the application is unprecedented in Indiana history, and it will be expensive for the discharger and will lead to confusion. It is worse yet if IDEM holds the public meeting and does not allow the applicant to speak to its own project. (WCW)

Response: The proposed rule no longer requires a public meeting be held prior to the submittal of the antidegradation demonstration. However, IDEM encourages those proposing a new or increased discharge to solicit public input about their proposal prior to submitting the antidegradation demonstration.

Comment: The rule is not perfect but it is a good attempt to address the many competing interests at stake in this complicated area of the Clean Water Act. One objection to the rule is in regard to the exception made for mercury in the antidegradation standard for OSRW in the Great Lakes Basin. There is no scientific justification for treating mercury differently than other bioaccumulative chemicals of concern. Mercury in our water poses a significant health threat to children. We must not try to avoid dealing with that problem just because it is difficult to resolve. (BQ)

Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any new or increased discharge of mercury is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

Comment: Limiting the locally held public meeting on the antidegradation demonstration to people living or working within 15 miles of a proposed discharge is arbitrary and imposes an unnecessary burden on both IDEM and the public. People from farther away who enjoy a body of water for recreational or aesthetic purposes have a legitimate interest in seeing it protected as do people who may live more than 15 miles downstream and outside of the 10-digit watershed. Does IDEM really want the trouble of verifying addresses and workplaces of all people who request a meeting? Requests from 25 people, no matter their location or workplace, should be enough to trigger the public meeting. Additionally, applicants should not be prevented from speaking at the public meeting held on their projects; the public deserves to hear from the applicant about the project. To alert applicants to the importance of these public meetings and encourage them to seriously consider holding their own meetings, language could be added specifically stating that the commissioner will consider comments made at the public meeting in making a determination on a proposed discharge. (BQ)

Response: The intent of the rule is to focus the request for a public hearing on the people with the highest potential to be affected by the new or increased discharge. The social and economic impacts from the activity causing the new or increased discharge must be evaluated in

the vicinity of the discharge and IDEM believes the 10 digit watershed is an appropriate scale for evaluating the impacts of the proposed discharge and for reaching the potentially impacted public. If a public hearing is scheduled, anyone attending the hearing may provide comments.

Comment: It is often missed and worth repeating that at no time would the water quality standards be exceeded as a result of the antidegradation process. It is not in any way lowering the quality of the water below the water quality standard. (VG)

Response: IDEM agrees.

Comment: However, it is the NPDES process that is about meeting the water quality standard. Antidegradation is a CWA requirement beyond the NPDES process and is about keeping water from becoming lower in water quality even when it is better than the water quality standard, which is the minimum threshold of quality. (VG)

Response: IDEM agrees.

Comment: The draft rule is significantly improved but there remain areas of concern that are ambiguous and subjective:

(1) There is no bright line or specific fixed criteria that can be used by a stakeholder to clearly determine if an activity would require an antidegradation demonstration.
(2) If an antidegradation demonstration is required, how much research, analysis and written explanation would qualify as an acceptable demonstration of an effective alternative treatment technology or pollution prevention?
(3) How detailed will be the requirement be to show that the rejection of the antidegradation allowance would negatively affect important social or economic area development, and who makes that determination?

The necessary action related to antidegradation could be achieved through a nonrule policy document, which the Chamber would support. (VG)

Response: IDEM believes that to fulfill the federal antidegradation requirement, this rulemaking is necessary. IDEM, however, is committed to a workable antidegradation rule and will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.

Comment: The rule language is significantly restrictive for economic development in Indiana and will be more restrictive than many other states and many of those around Indiana. Therefore, the Chamber would prefer that the rule not be preliminarily adopted until some of these concerns are resolved. (VG)

Response: The proposed rule meets federal antidegradation requirements and a critical component of the process consists of the consideration of important economic development considerations, as required by federal and state law. The antidegradation demonstration process consists of a careful balancing of environmental, economic and social factors.

Comment: The antideg draft rule, in relation to agriculture, will regulate NPDES dischargers with and without limits and also regulate operations that have no permit at all. The rule should be limited to operations having NPDES permits that contain limits. If there are no criteria, then no limits can be determined; yet, the rule effectively becomes a de facto zero limit, which is impossible to meet. (JM)

Response: The proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana. Many agricultural related discharges are exempt from NPDES requirements.

327 IAC 5-2-4 says: "The following discharges do not require an NPDES permit:

(4) Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and

forest lands, except that this exclusion shall not apply to discharges from concentrated animal feeding operations as defined in 327 IAC 5-4-3 or from silvicultural point sources as defined in 327 IAC 5-4-7."

Regulated point source discharges proposing a new or increased loading of a regulated pollutant will be subject to the antidegradation implementation procedures outlined in this proposed rule. The pollutant parameters that are regulated under this proposed rule with respect to the NPDES permit program are limited to those parameters that can be included in a NPDES permit based on the source and nature of the discharge and federal effluent limitation guidelines.

Comment: Most agricultural operations either have NPDES permits without discharges and, therefore, no limits, or the vast majority of operations have no permits at all. However, the rule tries to regulate these operations by using the term "regulated pollutant". That term has virtually no meaning other than to add a new category that tries to mimic what is in the NPDES permits with limits, but it fails to do that because there is no way to determine the baseline as to what those limits are. This makes the rule unworkable for agriculture. The term "regulated pollutant" and the portion of the rule related to it should be eliminated, and the rule should be limited to just those NPDES permits with discharges that have limits imposed upon them. (JM)

Response: The pollutant parameters that are regulated under this proposed rule with respect to the NPDES permit program are limited to those parameters that can be included in a NPDES permit based on the source and nature of the discharge and federal effluent limitation guidelines. As stated above, if an activity has no discharge, or if the activity is exempt from regulation under the Clean Water Act, antidegradation regulations do not apply to that activity.

Comment: Agriculture has many different types of discharges, including storm water discharges, run off from fields, which do not need permits at all. There is nothing in federal or state regulation or rules that says those type discharges have to have permits, but, under this rule, they fall under the de minimis requirement and, therefore, fall under the rule. (JM)

Response: This proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana.

Comment: On balance, the rule seems to be a good rule that deserves preliminary adoption because antidegradation is a very important, and the rule needs to move forward. As a former biology professor at Butler University with research experience with water pollution and, especially, with mercury, the exclusion for mercury that is in the rule needs to be reconsidered. Mercury is highly toxic and it is already widespread in Indiana's surface waters. We ought to be doing everything we can to minimize exposure of the public to mercury. (RM)

Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

Comment: Hoosier Environmental Council urges preliminary adoption of the draft rule but believes the exemption for mercury and treatment of mercury different from other bioaccumulative chemicals of concern is not justified, has no basis in science, and should be removed from the rule. Over 300 of the 2800 impaired water segments in Indiana are impaired based on excessive mercury levels in fish. That is a significant health issue that needs to be addressed. (TM)

Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased

discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

Comment: The rule needs more clarity regarding general permitting and how its application with antidegradation is to be handled. (IMA)

Response: As noted in the rule, IDEM will have to do an antidegradation demonstration for each general permit. A successful antidegradation demonstration for a general permit means a demonstration is not needed for a notice of intent (NOI) submitted for coverage under the permit. The NOI is reviewed to ensure the proposed action qualifies for the general permit coverage.

Comment: Public participation is an important part of our system, but the rule's requirement for a public meeting before the application is submitted takes it much closer to a business decision in terms of whether the company will or will not proceed, and that is a private company matter. Public participation should come after application submission to the agency and that notice is adequately given through the current processes and procedures. If this rule should move forward containing the public meeting requirement before submission of the application, then there needs to be more information about what is required and how to conduct the public meeting. (IMA)

Response: The proposed rule no longer requires a public meeting be held prior to the submittal of the antidegradation demonstration. However, IDEM encourages those proposing a new or increased discharge to solicit public input about their proposal prior to submitting the antidegradation demonstration.

Comment: The board needs to consider the future of this rule after final adoption, many years down the road, and the impact the rule will have on the use of these water bodies, particularly toward economic development. (IMA)

Response: The rule addresses impacts on waterbodies on a case-by-case basis, and the consideration of economic and social factors is part of the antidegradation demonstration process. The rule also reflects the current requirements of federal and state law regarding antidegradation.

Comment: One of the main remaining problems with the rule is the treatment of mercury as a non-BCC when, in fact, it is one of the most harmful of BCCs. The Great Lakes Basin have a restriction on BCC's so the draft rule as it relates to Lake Michigan and the degradation of water quality in Lake Michigan is especially important. The rule as currently written would allow significant loadings of mercury to be put into Lake Michigan, whereas it does not allow significant loading so other BCC's into Lake Michigan. In effect, the rule treats mercury as a non-BCC and that needs to change in the rule. (JH)

Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

Comment: Pollutant trading is another issue remaining with the draft rule and an issue that EPA has raised concerns over when they have reviewed past drafts of this rule. There are several pollution trading issues, including trading across watersheds and cross pollutant trading, that, if not fixed in the rule itself, need to be clarified through guidance to make them legal under the Clean Water Act. The issue with trading is that the antidegradation standard requires

attention to the area in which the discharge is located and that particular human community and ecological community. The problem of scale needs to be corrected so that an impact to a particular community is mitigated in that community, not a hundred miles away. (JH)

Response: It is important to note that in the proposed rules, the pollution trading activities are no longer exempt from the antidegradation demonstration requirements, but require some level of an antidegradation demonstration including a demonstration that the activity is necessary when compared to options for no degradation, minimal degradation and degradation mitigation techniques or alternatives. IDEM believes the 10 digit watershed is an appropriate scale to evaluate pollution trading.

Comment: The main concern for pork producers with regard to the antidegradation rule is the proposed effect on agricultural discharges and runoff if the rule is adopted as written. Few agricultural operations have intentional discharges into navigable waters. The more common type of discharge is the one where the farmer has no control over it, like runoff from land application area or in periods of very high flow due to a rainfall event. Since these types of discharges occur during periods of very high flow, they shouldn't be forced to do a calculation, as they are in this rule, where the trigger for an antidegradation demonstration is designed to be determined with a calculation based on the lowest flow of a receiving water. When the flow of the receiving water is at its lowest, the chance of an agricultural discharge of this type is at its very lowest. Similarly, these types of nutrient losses are not subject to an NPDES permit because the Clean Water Act specifically excludes them from the definition of point source, likely due to the fact that intermittent, sporadic discharges that are impossible to measure do not fit well into that NPDES permit mold. Therefore, the best way to address the rule's shortcomings is to limit the scope to the rule to NPDES permit holders that have pollutants with permit limits. (IPA)

Response: The proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana. Many agricultural related discharges are exempt from NPDES requirements.

327 IAC 5-2-4 says: "The following discharges do not require an NPDES permit:

> Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, except that this exclusion shall not apply to discharges from concentrated animal feeding operations as defined in 327 IAC 5-4-3 or from silvicultural point sources as defined in 327 IAC 5-4-7."

Comment: If the rule remains unchanged with the broad scope of applicability that it now has, then the unique characteristics of agricultural runoff should be exempted similarly to the exemption found in the draft rule at 327 IAC 2-1.3-4(a)(1) but with the exemption expanded to all surface waters. Agricultural runoff fits perfectly into the five factors listed at that exemption citation. (IPA)

Response: The proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana. Many agricultural related discharges are exempt from NPDES requirements.

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Comment: According to some of the commenters, there is concern that the antidegradation rule covers more than NPDES permits and others have concern that it doesn't cover anything more than NPDES permits. There is no problem if in fact the rule only covers NPDES permits. My law suit over the Kentucky antidegradation rule was about the Kentucky rule not having implementation rules for 401 projects. The District Court said otherwise. If this Indiana antidegradation rule is limited to NPDES, maybe some clarification can be added. (AE)

Response: To comply with the Clean Water Act, Indiana's antidegradation standards apply to all surface waters of the state. The antidegradation implementation procedures apply to those activities over which IDEM has regulatory authority including 401 certification and NPDES permitted stormwater discharges. IDEM believes the 401 certification requirements to avoid, minimize, and mitigate for impacts to water quality satisfy antidegradation.

Comment: Some commenters have objected to the rule saying it is impossible to apply unless there are existing permit limits. This does not seem right. Obviously, in the case of a brand new permit, there were no existing limits. In the case of an existing permit where a pollutant loading is going to be doubled, the permit might not have needed a permit limit before, but with increasing the loading the discharge should be subject to antidegradation. (AE)

Response: The proposed rule requirements apply to a new or increased discharge of a regulated pollutant to a surface water of the state that results in a significant lowering of water quality.

Comment: Having only narrative as opposed to numeric standards does not mean the contaminant is unimportant. Phosphorus, which is affecting drinking water across the state, does not have a numeric standard for most water bodies in Indiana. A rule that allowed unrestricted new or increased discharges of phosphorus or nitrogen or allowed any new phosphorus or nitrogen into Indiana waters that hasn't been shown to be necessary would likely not be approved by EPA. (AE)

Response IDEM agrees and believes it is appropriate to include narrative criteria in the definition of regulated pollutant because the reality is that there are pollutants, such as phosphorus, that do not currently have a numeric water quality standard, but do merit regulatory review.

Comment: The idea that this antidegradation rule covers agriculture or runoff from row crops can't be IDEM's intent because the Clean Water Act explicitly exempts storm water runoff from anything but CAFOs. If a CAFO, which generally has a no discharge permit, has a discharge, then that CAFO has a problem due to discharging without a permit, not due to antidegradation. (AE)

Response: The proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana. Many agricultural related discharges are exempt from NPDES requirements.

327 IAC 5-2-4 says: "The following discharges do not require an NPDES permit:

(1) Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, except that this exclusion shall not apply to discharges from concentrated animal feeding operations as defined in 327 IAC 5-4-3 or from silvicultural point sources as defined in 327 IAC 5-4-7."

Regulated point source discharges proposing a new or increased loading of a regulated pollutant will be subject to the antidegradation implementation procedures outlined in this proposed rule. The pollutant parameters that are regulated under this proposed rule with respect to the NPDES permit program are limited to those parameters that can be included in a NPDES permit based on the source and nature of the discharge and federal effluent limitation guidelines.

Comment: The idea that this antidegradation rule is stronger than other states is not accurate. There are some states that have weaker rules or no rules. Indiana is not the first or last state to develop its antidegradation rule. Illinois has a stronger rule than Indiana's draft rule and has been operating under it for ten years. Illinois has a lot of troubles currently, but they are not being blamed on antidegradation. Iowa also has a stronger rule than Indiana's draft rule. (AE)

Response: IDEM believes the proposed rule establishes an appropriate regulatory balance to accomplish antidegradation implementation in Indiana.

Comment: The antidegradation rule language concerning general permits seems to be that anything subject to a general permit is outside of antidegradation. That's going to make it very hard to write the general permits because the general permits have to mesh properly with the federal antidegradation rules. (AE)

Response: As noted in the rule, IDEM will have to do an antidegradation demonstration for each general permit. A successful antidegradation demonstration for a general permit means a demonstration is not needed for a notice of intent (NOI) submitted for coverage under the permit. The NOI is reviewed to ensure the proposed action qualifies for the general permit coverage.

Comment: The antidegradation draft rule needs to be reasonable, clear in meaning and operation, and not more restrictive than other Region 5 states. Several key definitions are unclear and vague. These definitions are important because they contribute to the regulatory certainty needed by the electric power industry and other industrial stakeholders to secure financial resources necessary for the construction of appropriate technologies and other facilities. (1) "Deliberate action" is not defined in the draft rule and, thus, fails to provide regulatory certainty for when an antidegradation review is triggered. (2) The terms "available loading capacity" and "total loading capacity" are so vague in their definitions that they will be subject to misinterpretation and question. (3) The term "regulated pollutant" needs to be used consistently throughout the rule, removing all references to "pollutants", "parameters", and "substances". (4)A definition of "minimal degradation" is needed in the rule. (IUG)

Response: IDEM believes the proposed rule definitions are clear. In the proposed rule the term "deliberate action" was replaced by the term "deliberate activity" which is not specifically defined because this term consists of words that have a common meaning as does the term "minimal degradation". In the proposed rule, the definitions of "available loading capacity" and "total loading capacity" were revised for clarification. The proposed rule was reviewed for consistency in terminology.

Comment: It would be more appropriate to trigger the need for an antidgradation review off an action that requires a new permit or permit modification. Those actions are clearly and legally defined. (IUG)

Response: IDEM believes it is appropriate for the rule to address all regulated discharges that result in a significant lowering of water quality. Under the commenter's proposal, regulated pollutant loading increases that are greater than de minimis, but do not cause a reasonable potential to exceed water quality standards would be exempted from antidegradation review.

Comment: The terms "available loading capacity" and "total loading capacity" both need modified definitions to correct a mistaken requirement for an approved mixing zone for streams that are involved in an antidegradation review. (IUG)

Response: In the proposed rule, the definitions of "available loading capacity" and "total loading capacity" were revised for clarification.

Comment: The term "regulated pollutant" needs to be revised to clarify that narrative criteria can be the basis of a "regulated pollutant" that is subject to antidegradation review only if a numerical value has been assigned to the pollutant or pollutants to represent the intent of the narrative criterion. Otherwise, it is not feasible to implement de minimis concepts. (IUG)

Response: IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant. IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, for NPDES permits, many of the narrative criteria of Indiana's water quality standards may be protected through the establishment of numeric effluent limitations. These numeric effluent limitations are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation lagoon.

Comment: The definition of "threatened and endangered species" needs revision to cross reference the definition as stated in the federal Endangered Species Act and the Indiana authority. The current reference to a list or database that is subject to internal agency revision without notice or review is inappropriate, and such a list should only be referred to as guidance unless such list or database is subject to formal rulemaking. (IUG)

Response: IDEM believes that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species and has revised the definition to include those species on the language suggested for final adoption

Comment: The definition of "toxic substances" would be more precise if it referred to Section 307(a)(1) of the Clean Water Act. (IUG)

Response: The definition of "toxic substances" does refer to Section 307(a)(1) of the Clean Water Act and is consistent with the definition found in Indiana's water quality standards at 327 IAC 2-1-9(55).

Comment: The U.S. Supreme Court in the Entergy Corporation v. Riverkeeper decision, left open the issue as to whether economic feasibility could be considered in regards to antidegradation. Therefore, IDEM should clarify that the social and economic factors analysis be broad enough to incorporate local, state, and regional impacts. The language of the draft rule at the beginning should be revised as follows: "Where relevant, the anticipated impact on economic and social factors on a local, state, and regional basis are appropriate." This would allow for the consideration of the benefits that a local community might receive from a power plant that is located many miles away. (IUG)

Response: The economic and social factors listed for evaluation, where relevant, in an antidegradation demonstration are those identified in statute at IC 13-18-3-2 (s). One of these factors, found in the proposed rule at Section 5 (g) (5) (P) is: " Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by: (i) a legislative body; or (ii) other government officials."
This would allow for the inclusion of information on regional and state level impacts.

Comment: With regard to 316(a) variances for thermal discharges, the exception for ONRW is not appropriate. If an entity fully meets the 316(a) criteria, the applicable Clean Water Act protections should be achieved to protect existing uses and, therefore, should be exempt from an antidegradation review. (IUG)

Response: The antidegradation standard is consistent with federal regulation which only allows for temporary reductions in water quality in Outstanding National Resource Waters – see 40 CFR § 131.12(a)(3).

Comment: The original draft of the antidegradation rule required maintenance of 75% of the available loading capacity. The revised draft rule has changed that to 90% maintenance. This de minimis exclusion from significant lowering should be changed back to 75% maintenance of the available loading capacity. (IUG)

Response: The purpose of the benchmark available loading capacity is to account for multiple de minimis increased loadings of a pollutant parameter at one location over an extended

period of time. After an increased loading, the benchmark loading capacity is compared against the available loading capacity to determine if the stream's available loading capacity has been reduced below the benchmark loading capacity. Proposed discharges that will reduce the available loading capacity below the benchmark are not de minimis, but may still be approved to proceed if a sufficient antidegradation demonstration is submitted to and approved by the agency. IDEM believes that, for defining cummulative de minimis, maintaining 90% of the available loading capacity is appropriate.

Comment: Under the draft antidegradation rule, a plant with a limit of 100 but only currently discharging at 50 would be required to do an antidegradation demonstration if the plant made changes that took the discharge up to 60 of the pollutant. This requirement of the rule is problematic because the plant is not going beyond what is allowable and that shouldn't be an antidegradation event. (FA)

Response: IDEM believes it is appropriate for the rule to address all regulated discharges that result in a significant lowering of water quality. IDEM believes the concerns raised about changes in process within an existing NPDES permit are addressed in by the exemptions found in the proposed rule in Section 4(c)(2):

"A new or increased loading that results from one (1) of the following activities that does not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

(A) A change in loading of a regulated pollutant within the existing capacity and processes that are covered by an existing applicable permit**,** including, but not limited to, the following:

(i) Normal operational variability, including, but not limited to, intermittent increased loadings due to wet weather conditions.

(ii) A change in intake water pollutants not caused by the discharger.

(iii) Increasing the production hours of the facility, for example, adding a second shift.

(iv) Increasing the rate of production.

(v) A change at an internal outfall that does not directly discharge to a surface water of the state.

(vi) A change in the applicable effluent limitation guideline based on a change in production.

(B) A bypass not prohibited by 327 IAC 5-2-8(11).

(C) A new limit for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated pollutant discharged, including a new limit that is a result of one (1) of the following:

(i) New or improved:

(AA) monitoring data; or

(BB) analytical methods.

(ii) New or modified:

(AA) water quality criteria; or

(BB) effluent limitation guidelines, pretreatment standards, or control requirements for POTWs.

(D) An increased loading of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewered area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, by a POTW, provided the following are true:

(i) There is no increase in the existing NPDES permit limits.

(ii) There is no increase beyond the treatment capacity of the facility.
(iii) There is no significant change expected in the characteristics of the wastewater discharged.
(iv) There is no increased loading of BCCs from nondomestic wastes."

Comment: The current draft rule has a very big change from prior rules because it requires not only not exceeding the ten percent increase in unused loading capacity but also includes the requirement to leave at least 90 percent of the unused loading capacity unused. The federal Great Lakes Initiative only requires ten percent remain unused, not 90 percent. If the first discharger uses 9.9 percent, then every other discharger that wants to ask to discharge or increase its discharge will have to do an antidegradation demonstration no matter how small the increase is from the additional dischargers. This requirement will put a significant damper on economic growth so it should be reconsidered. (FA)

Response: Every new or increased discharge that will result in a lowering of water quality must be evaluated at the time of the request to determine if the new or increased loading will result in a significant lowering of water quality. A significant lowering of water quality will occur when the new or increased discharge will use more than 10% of the available loading capacity or when the new or increased discharge will result in an available loading capacity that is less than the benchmark loading capacity. When an increased loading is not accompanied with an increase in the design flow and the available loading capacity is equal to the benchmark available loading capacity, then any increased loading, unless it is exempt, will trigger the need for some level of an antidegradation demonstration.

Comment: The current draft rule has another big change from prior rules in that virtually everything has to go through some type of antidegradation review. The previous rule version had some fairly clean exemptions for particular types of situations that simply would not have to go through review because of their nature and characteristics. From a resource standpoint, it is very problematic because a facility will always have to prepare a demonstration, hold a public hearing and provide detailed documentation to IDEM, and IDEM will have to have the staffing to review and make decisions on those applications before permits can be issued. Ohio had such a broad rule that they had significant problems in processing applications. Requiring everyone to do a demonstration should be reconsidered. For example, a community with an approved long term control plan who is decreasing combined sewer overflows by routing more wastewater and stormwater to the treatment plant and thereby increasing loading from the treatment plant should not have to go through an antidegradation demonstration. (FA)

Response: IDEM has structured the proposed rule such that the appropriate level of antidegradation review is done based on the proposed activity. The proposed rule does contain a description of de minimis discharges and appropriate exemptions that do not require any antidegradation demonstration. Other activities have simplified submission requirements for an antidegradation demonstration, including the example of a community decreasing combined sewer overflows. The proposed rule no longer requires a public meeting be held prior to the submittal of the antidegradation demonstration.

Comment: Further discussions are needed on the issue of mercury because mercury is in every discharge. The Great Lakes Basin rules have restrictions on the ability to increase mercury loadings, which will mean that there can be no increase in any discharge because whenever you increase a discharge you will be increasing mercury. Mercury is understood to be a serious problem, but at the same time, there are some practical issues that do need to be dealt with for this rule. (FA)

Response: IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. However, this does not mean that the toxicity

of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any new or increased discharge of mercury is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

Comment: This rule is so unclear that it is unworkable. Throughout the rulemaking process, we have been unable to get satisfactory answers as to how the rule would impact agricultural operations and, specifically, livestock producers. The answer has largely been that the rule is not going to impact the producers because primarily they do not have discharges, outside of the few that will have to have NPDES permits once those new rules are adopted. However, this version of the antidegradation rule specifically focuses on nutrients. Nutrient is included in the definition of "regulated pollutant" though other pollutants are not included in that definition. Also, under Tier 1 antidegradation standards, the rule refers to the regulation of nonpoint sources, which are primarily agricultural sources. This raises the concern that the antidegradation rule is more broad than IDEM has stated and that it has the potential to impact all farmers. (IFB)

Response: The proposed rule does not expand the authority to regulate discharges of wastewater beyond those provided by the Clean Water Act, the associated regulations promulgated by the U.S. EPA and the associated rules promulgated by the state of Indiana. Many agricultural related discharges are exempt from NPDES requirements.
327 IAC 5-2-4 says: "The following discharges do not require an NPDES permit:

(1) Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, except that this exclusion shall not apply to discharges from concentrated animal feeding operations as defined in 327 IAC 5-4-3 or from silvicultural point sources as defined in 327 IAC 5-4-7."

Regulated point source discharges proposing a new or increased loading of a regulated pollutant will be subject to the antidegradation implementation procedures outlined in this proposed rule. The pollutant parameters that are regulated under this proposed rule with respect to the NPDES permit program are limited to those parameters that can be included in a NPDES permit based on the source and nature of the discharge and federal effluent limitation guidelines.

Comment: The rule should be easy to understand so those regulated under it can know how to comply and the agency can know how to clearly enforce the rule. This version of the antidegradation rule is not understandable and may set in place a series of lawsuits and ongoing litigation about how to interpret the rule. Turning to the judicial branch to determine how to define the rule is inappropriate. (IFB)

Response: IDEM worked with key stakeholders throughout the rule development process to draft language that meets both federal requirements and state statute. IDEM believes the proposed rule is clear and establishes an appropriate balance to accomplish antidegradation implementation in Indiana. IDEM will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.

Comment: The specific interest with the antidegradation rule to the home building industry is the general permitting issue since builders are required to submit their general permit notice of intent for Rule 5, which is the storm water associated with construction runoff. Earlier versions of the antidegradation rule didn't require the home builders to provide a social and economic analysis. That social and economic analysis is done at the local level when a builder or developer gets the subdivision approved. Additional requirements should not be put on that general permit holder. When a general permit holder submits the notice of intent, any additional public noticing should be required at that point without adding any more delays afterward. (IBA)

Response: As noted in the rule, IDEM will have to do an antidegradation demonstration for each general permit. A successful antidegradation demonstration for a general permit means a demonstration is not needed for a notice of intent (NOI) submitted for coverage under the permit. The NOI is reviewed to ensure the proposed action qualifies for the general permit coverage.

Comment: Permitting certainty is of great importance to economic development, but this antidegradation draft rule contains a great deal of uncertainty. (NIF)

Response: IDEM worked with key stakeholders throughout the rule development process to draft language that meets both federal requirements and state statute. IDEM believes the proposed rule is clear and establishes an appropriate balance to accomplish antidegradation implementation in Indiana. IDEM will evaluate the need for supplemental materials and guidance documents as the rulemaking process moves forward.